erating upon the adoption of a law, the general rule is that equity will not enjoin the passage of an ordinance which is legislative in character. *Chicago, Rock Island, & Pacific Ry. Co.* v. *City of Lincoln*, 124 N. W. 142 (Neb.).

But a municipal corporation also exercises other than legislative functions. And, while the rule above is everywhere recognized, it has frequently been held that it has no application if the ordinance is not legislative in character; in which case its passage may be enjoined.[2] Even cases adopting this distinction as a basis of decision reach conflicting results because of the difficulty of determining whether a particular ordinance is in fact legislative. Thus there have been decisions both ways as to enjoining the passage of an ordinance granting to a public service corporation the privilege of using the streets.[3] And, although there would seem to be no distinction, in this connection, between an ordinance authorizing a contract with a gas company and one authorizing a contract with a water company, yet relief has been refused in the former case [4] but granted in the latter.[5] A different limitation on the general rule is adopted in other cases, which hold that an injunction will issue against the passage of an ordinance which is *ultra vires* the municipal body about to pass it, even though the ordinance is clearly legislative in character.[6] Under such circumstances a few courts have said that relief by injunction may be had as well before as after its passage.[7] Much more frequently, however, it has been held that the relief will not be granted in any case unless the mere passage of the ordinance, as distinguished from its enforcement, would cause irreparable damage.[8] Were this rule followed strictly, it would seem to preclude relief in any case; for an injunction either against the enforcement of the ordinance, or the execution of the contract authorized, or against the exercise of the privilege granted, would, under any circumstances, be a remedy wholly adequate.[9]

This being so, no hardship could result from a general rule that an injunction should never be issued against the passage of an ordinance. And it is believed that such a rule would be a proper limitation on the jurisdiction of equity. Certainly, no convincing reason in favor of a further extension has been suggested in any of the cases. Indeed, the distinctions drawn in the decisions have little merit, on principle, as bearing on the question in hand, and have led only to confusion. Other things being equal, it seems preferable that the members of municipal assemblies be left to exercise their discretion in voting on subjects under discussion without interference by the courts.

REMEDIES OF AN ABUTTING LANDOWNER WHOSE PROPERTY IS INJURED BY PUBLIC WORKS. — Since 1850 the constitutional provision that property shall not be taken for public use without compensation has been construed to apply to the right of an abutting landowner not to have his property de-

[2] Roberts *v.* City of Louisville, 92 Ky. 95.

[3] State *ex rel.* Rose *v.* Superior Court of Milwaukee, 105 Wis. 651; Albright *v.* Fisher, 164 Mo. 56; State *ex rel.* Abel *v.* Gates, 190 Mo. 540.

[4] Montgomery Gas-Light Co. *v.* City Council of Montgomery, 87 Ala. 245.

[5] Poppleton *v.* Moores, 62 Neb. 851.

[6] International Trading-Stamp Co. *v.* City of Memphis, 101 Tenn. 181.

[7] See Spring Valley Water-Works *v.* Bartlett, 16 Fed. 615.

[8] Murphy *v.* East Portland, 42 Fed. 308.

[9] See Whitney *v.* Mayor, etc. of New York, 28 Barb. (N. Y.) 233.

preciated in value by smoke, noise, or deprivation of light and air, etc., incident to the running of an elevated or other railroad.[1] The property right of which the owner is deprived is the action of nuisance which he would have, were the railroad in a private business.[2] Assuming the existence of this right, interesting questions arise as to the owner's remedies for its infringement by a public service corporation.

An action at law will lie to recover compensation for realty appropriated to public use without proper condemnation proceedings, on the principle of *quantum meruit*, or by analogy to the action of trover in the case of personal property.[3] Similarly, future damages may be recovered for injury to realty where the damage is permanent.[4] In such cases the true rule of compensation is the depreciation in the value of the land referable to the defendant's tort,[5] although in New York damages are allowed only to the time of the trial.[6] In a few jurisdictions equity has relieved the landowner in rather an unusual manner: an injunction will issue to be operative unless the defendant within a limited time pay the compensation fixed by the court, and upon such payment the plaintiff is required to execute a conveyance of the so-called easements.[7] Such an injunction is expressly denied in Illinois and several other states,[8] to which South Dakota is now to be added. *Hyde* v. *Minnesota, D. & P. Ry.*, 123 N. W. 849.

An analogy to this equitable remedy is the owner's right, allowed in some cases, to enjoin the use of land appropriated, until compensation is made.[9] But such relief is really no more than a summary means of compelling payment; and the remedy at law seems adequate both in the case where land is actually taken and where it is injured. Only in New York, there-

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[1] LEWIS, EMINENT DOMAIN, 3 ed., §§ 63-66 (54-57); Eaton *v.* B. C. & M. R. R. Co., 51 N. H. 504; Story *v.* N. Y. Elevated Ry., 90 N. Y. 122. See Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166, 177. But see Fries *v.* N. Y. & H. R. R., 169 N. Y. 270. See also 15 HARV. L. REV. 665; 19 *ibid.* 127.

[2] See Wehn *v.* Comm's of Gage Co., 5 Neb. 494; Burwell *v.* Comm's, 93 N. C. 73; LEWIS, EMINENT DOMAIN, 3 ed., § 65 (56).

[3] U. S. *v.* Linah, 188 U. S. 445. See LEWIS, EMINENT DOMAIN, 3 ed., § 889 (623), note 41 and cases cited.

[4] City of Centralia *v.* Wright, 156 Ill. 561; Aldis *v.* Union Elev. R. R., 203 Ill. 567; Harvey *v.* Mason City R. R., 129 Ia. 465; Chicago, etc. R. R. Co. *v.* O'Neill, 58 Neb. 239; White *v.* R. R., 113 N. C. 610; Grafton *v.* B. & O. R. R., 21 Fed. 309; R. R. Co. *v.* Hambleton, 40 Oh. St. 496; O'Brien's Ex. *v.* Pa. S. V. R. R. Co., 119 Pa. St. 184; Blanchard *v.* Kansas City, 5 McCrary (U. S.) 217.

[5] See Bohm *v.* Metropolitan Elevated Ry., 129 N. Y. 576.

[6] Pond *v.* Metropolitan Elevated Ry., 112 N. Y. 186; Ottentot *v.* N. Y., L. & W. Ry. Co., 119 N. Y. 603; Tallman *v.* Metropolitan Elevated Ry., 121 N. Y. 119. See Pappenheim *v.* Metropolitan Elevated Ry., 128 N. Y. 436.

[7] Pappenheim *v.* Metropolitan Elevated Ry., *supra;* Galway *v.* Metropolitan Elevated Ry., 128 N. Y. 132; Kernoochan *v.* Manhattan Ry. Co., 161 N. Y. 339; Westphal *v.* City of New York, 177 N. Y. 140; Woolsey *v.* N. Y. Elevated Ry., 134 N. Y. 323; McElroy *v.* Kansas City, 21 Fed. 257; Ingersoll *v.* Newton, 60 N. J. Eq. 399 (reversing 57 N. J. Eq. 367, on another ground); Patton *v.* Olympia Door Co., 15 Wash. 210. See also Gray *v.* M. R. Co., 128 N. Y. 499. In Long Island R. R. Co. *v.* Garvey, 159 N. Y. 334, the railroad succeeded by condemnation in doing what it had been unconditionally restrained from doing in Garvey *v.* Long Island R. R. Co., 159 N. Y. 323 — running a turntable and steam trains near the plaintiff's premises.

[8] Stetson *v.* Chicago & Evanston R. R., 75 Ill. 74. See AMES, CASES ON EQUITY, 599, note 4 and cases cited.

[9] Elwell *v.* Eastern R. R., 124 Mass. 160; Evans *v.* M. I. & N. Ry. Co., 64 Mo. 453 (railroad insolvent). See LEWIS, EMINENT DOMAIN, 3 ed., § 883 (618) and cases cited.

fore, because of the anomalous rule of damages at law, is such equitable interference justifiable.[10] The basis of this relief in other jurisdictions is said to be the necessity of protecting the private landowner, because of his unequal position, against the abuse of the extensive power of eminent domain granted to large corporations.[11] But, unless the corporation is irresponsible or insolvent, the only hardship on the plaintiff in leaving him to his remedy at law is a possible delay in receiving compensation.[12] In other words, it would seem that the plaintiff, to entitle him to such a conditional injunction, should show his remedy at law to be inadequate.[13] Moreover, even assuming that there may be proper equitable jurisdiction in the case of land appropriated, the difficulty of accurately determining damages in advance may give cause for a different rule where no land is actually taken. For until the structure is built and trains are running, it may be speculative even to say that any legal right of the plaintiff will be infringed; then, too, a rise in the value of the lands in the vicinity because of the improvement may reduce his claim to nominal damages.[14] It is true that this argument applies equally against condemning in advance these intangible rights; but it is not a great hardship to make the plaintiff wait until he has been actually damaged before suing at law for compensation.

THE JURISDICTION OF EQUITY OVER THE REALTY OF AN INFANT. — Whenever a suit is instituted in a court of chancery relative to an infant's person or property, the infant is treated as the ward of the court, under its special cognizance and protection.[1] This jurisdiction seems to have had its origin in the functions of the king as *parens patriae*, and to have been transferred to the courts of chancery at an early date.[2] The infant's personal estate, even though derived as an income from realty, has always been at the disposition of the court.[3] His legal estates in realty, however, could not, by the old English law, be converted into personalty.[4] The reason for the distinction appears to have been that by changing the nature of the minor's estate from real to personal, the rights of third persons who would be entitled to succeed in case of the minor's death would be materially affected, inasmuch as personalty and realty descended in different channels.[5] Although this reason may once have been valid, it loses all force in view of the modern doctrine of equitable conversion, by which the proceeds of realty are treated in equity as realty until the infant, upon reaching majority, exercises his election.[6] Consequently many of our states have

[10] See Pond *v.* Metropolitan Elevated Ry., 112 N. Y. 186, 189.
[11] See East R. R. *v.* E. T. R. R., 75 Ala. 275.
[12] See McElroy *v.* Kansas City, 21 Fed. 257.
[13] In McElroy *v.* Kansas City, *supra*, the insolvency of the corporation was considered in determining the balance of convenience.
[14] Bohm *v.* Metropolitan Elevated Ry., 129 N. Y. 576.

[1] Lloyd *v.* Kirkwood, 112 Ill. 329; Rogers *v.* McLean, 34 N. Y. 536.
[2] See Losey *v.* Stanley, 147 N. Y. 560, 569.
[3] Winchester *v.* Norcliffe, 1 Vern. 434; Matter of Stevens, 114 N. Y. App. Div. 607.
[4] Russel *v.* Russel, 1 Molloy, 525; Calvert *v.* Godfrey, 6 Beav. 97.
[5] See Hale *v.* Hale, 146 Ill. 227, 249; Richards *v.* East Tennessee, etc. Ry. Co., 106 Ga. 614, 635.
[6] *In re* McMillan, 126 N. Y. App. Div. 155.